that a plaintiff may enter a judgment for want of an appearance, although he has not as required by statute filed his declaration prior to the return-day of the writ, *Vanormer* v. *Ford*, 98 Penn. St. 177; nor permit an action *ex contractu* to be brought to trial out of its order on the docket, on the affidavit of the plaintiff, his attorney or agent, of a belief that the defence is made for delay, and notice to the defendant or his attorney, unless it be made to appear satisfactorily that the defence is made in good faith, *Fisher* v. *Nat. Bank of Commerce*, 73 Ill. 34; nor strike out a pleading party, *Rice* v. *Ehele*, 55 N. Y. 518; nor alter a statute which gives the plaintiff in an action pending the right to examine the adverse party on oath before service of the complaint, *Glenney* v. *Stedwell*, 64 N. Y. 120; nor require a case for an appeal to be served within ten days after written notice of the decision or ruling, where the statute allows ten days after the entry of the judgment and notice thereof, "or within such time as may be prescribed by the rules of the court," *French* v. *Powers*, 80 N. Y. 146.

It has been held that a court's construction of its own rules may be reviewed on appeal, *Magill's Appeal*, 59 Penn. St. 430; *Rathbone* v. *Rathbone*, 5 Pick. 89; *Baker* v. *Blood*, 128 Mass. 545; *Wall* v. *Wall*, 2 Har. & Gil. 79; *Abercombie* v. *Riddle*, 3 Md. Ch. 320; *Maultsby* v. *Carty*, 11 Humph. 361; but see *Hughes* v. *Jackson*, 12 Md. 450; *Adams Express Co.* v. *Trego*, 35 Md. 47; *Gannon* v. *Fritz*, 79 Penn. St. 303.

JOHN H. STEWART.

Supreme Court of Minnesota.

WELSH *v.* WILSON.

The fact that one transacts his business in the building that is his dwelling does not divest it of its character as a dwelling, so as to make it lawful for an officer to break the outer door for the purpose of serving civil process against the owner.

No valid levy can be made by means of breaking into the dwelling of the defendant in the writ.

Where the sheriff makes an unlawful levy, and is sued for the trespass, it cannot be taken in mitigation of damages that, pursuant to such levy, he sold the goods, and paid the proceeds to the execution creditor.

MITCHELL, J., dissents on the ground that although the breaking is unlawful, the levy is not absolutely void, and damages can only be recovered for the breaking and not for the value of the goods.

APPEAL from a judgment of the District Court, Waseca County.

Collester Bros., for respondent, Kate G. Welsh.

Lewis & Leslie, for appellant, Hugh Wilson.

The opinion of the court was delivered by

GILFILLAN, C. J.—Plaintiff occupied in Waseca a building one story high, of only one room. In this she, with her daughter, slept; and did upon a kerosene stove what cooking she did, but

usually got their meals at a restaurant. In it she also pursued her trade as a milliner, and kept in it for sale, and exposed for sale, a stock of millinery goods. It was fitted up like a store, with shelves, tables for counters, show-cases on the tables, and one in front, on and in which her goods were kept for sale. The defendant, sheriff of the county, having an execution against her property, went, about 10 o'clock in the morning, to the building, the door of which was then locked, put his hand through the window, a pane of which was broken, took the lock off the door, entered, and levied on and removed her goods.

The validity of the levy is only in question. The room must be taken to have been plaintiff's dwelling—her abode—not merely when closed to business, but at all times while she occupied it for her dwelling. The fact that she also used it to transact her business did not change its character in that respect. It being her dwelling, it was unlawful for the sheriff to break the outer door to effect an entrance for the purpose of serving civil process. This proposition has never been doubted, either in England or in this country. It is also well settled in this country—there being no authority to the contrary—that no valid levy can be made by means of such unlawful entry. We may, perhaps, regret that such is the rule; may be able to see that unfortunate consequences will sometimes result from it; but it is too firmly established to be disturbed except by act of the legislature. The levy being invalid, nothing which the sheriff did pursuant to it was valid. Every subsequent act based on the levy, and depending on it for its lawfulness, was but a continuation and aggravation of the original trespass. It can therefore be of no avail to the sheriff that he sold the goods and paid the proceeds to the execution creditor. In the cases where, as in *Howard* v. *Manderfield*, 31 Minn. 237, such subsequent appropriation has been allowed to operate in mitigation of damages, there has been a subsequent valid levy, not connected with the trespass, which gave validity to the sale and appropriation of the proceeds.

Judgment affirmed.

MITCHELL, J. (*dissenting*).—The doctrine that, if a civil officer open a dwelling-house by forcing the outer door for the purpose of levying upon the owner's goods, the levy is unlawful and *void*, rests wholly upon the authority of *Ilsley* v. *Nichols*, 12 Pick. 269, which other cases have merely followed. Although it may be presump-

tuous to question such eminent authority, yet I am unable to concur in the doctrine of that case. The object of the legal maxim, that a man's house is his castle, is the protection of the inmates, and not an immunity of goods from attachment on civil process.

The law in England seems always to have been that, although the sheriff cannot break defendant's dwelling by force of a *fieri facias*, but is a trespasser in the breaking, yet the execution which he then doth in the house is good. Y. B. 18 E. IV., f. 4; Bacon's Abr. "Sheriff, N. E.;" *Semayne's Case*, 3 Rep. 93; *Lee* v. *Gansel*, 1 Cowp. 1. This seems to me to be on principle, and in its practical operation the better rule.

Inasmuch as the officer has been enabled to make the levy by means of his unlawful breaking, I do not deny that the levy may be *voidable*, so that the court might, on motion, made directly for that purpose, set aside the levy and thus place the parties *in statu quo*. But if the defendant allow the levy to stand, and sue for the trespass upon his dwelling, I do not think he can include in his damages the value of the non-exempt goods levied upon under the process. To allow this would not, in its practical results, place the parties *in statu quo*. If the trespasser is held liable for damages, actual and exemplary, for the breaking, I think this will sufficiently protect the inviolability of dwellings.

Looking at the matter from a practical standpoint, it seems to me that the doctrine of the opinion will often work badly. This seems to be virtually conceded by my brethren. And, the question being one of first impression in this state, I think we are at liberty to adopt the rule I have suggested.

When we first read this case the *dictum* in *Semayne's Case* at once occurred to us, and we at first thought that the dissenting opinion laid down the true rule of law. We have, however, taken the pains to examine the case reported in the Year Book, 18 Edw. IV., pl. 19, and other authorities dependent thereon, and have been compelled to change our mind and concede the correctness of the decision in the principal case. The case 18 Edw. IV., pl. 19, is translated thus: "Catesby came to the bar and showed how a *fieri facias* was directed to the sheriff of Middlesex to make execution for one J., upon a recovery by the said J. against one B.; and afterwards the said B. put all his goods into a chest, closed and locked; and afterwards the sheriff broke the door of the house, and entered the house and took the goods with him, &c. And whether the sheriff had done any wrong, &c? LITTLETON, and all his companions, held that the party might have a writ of trespass against the sheriff for the breaking of the house, notwithstanding the *fieri facias;* for the *fieri facias* shall not excuse him of the breaking the house, but of the taking of the goods only."

Upon the slender authority of the last clause of the last sentence above quoted,

which at best is meagre in detail and subject to very different constructions, depend all the subsequent cases favoring the views advocated in the dissenting opinion. *Semayne's Case*, 5 Co. 91; s. c. 1 Smith's Lead. Cas. (8th ed.), *183, and *Lee* v. *Gansel*, Cowp. 1, 6, are as to this point mere *dicta*, and Bacon's Abridgment, *Execution*, n. 7, depends for its authority entirely upon the *dictum* in *Semayne's Case*.

In the case of *Yates* v. *Delamayne*, Trin. T., 17 G. 3, Bac. Abr. *Execution*, n., p. 733, the court set aside an execution levied upon the defendant's goods in his dwelling-house, because the officer forcibly broke into the house to execute the writ.

The case of *Kerbey* v. *Denby*, 1 M. & W. 336, s. c. Tyrw. & Gr. 688, is important in this connection. This case was trespass for breaking and entering the plaintiff's dwelling-house and assaulting and imprisoning him, &c. The pleas were first, not guilty; secondly, as to all the trespasses alleged except the breaking of the house, a justification under a writ of *ca. sa.* and warrant thereon, by virtue of which the defendants entered the house—the outer door being open—and arrested the plaintiff. Replication (admitting the writ and warrant), *de injuria absque residuo causæ*. It was proved that the defendants, who were bailiffs, in execution of the warrant, broke open the outer door of the plaintiff's house, and so gained an entrance and arrested him. Upon this state of facts it was held, first, that the averment in the plea that the outer door was open was a material averment, for that the door's being open was a condition precedent to the defendant's right to enter and arrest the plaintiff in his house; and therefore that the plea was sufficiently traversed by the general replication, and it was not necessary to reply the breaking of the outer door; secondly, that the defendants having become trespassers *ab initio* by the breaking of the door, the jury were rightly directed that they might even on a plea of not guilty, give damages in respect of *all* the injuries complained of in the declaration.

In the United States the doctrine held by the majority of the court in the principal case is supported by the well-considered cases of *Ilsley* v. *Nichols*, 12 Pick. 270; *People* v. *Hubbard*, 24 Wend. 369; *Curtis* v. *Hubbard*, 1 Hill 336; s. c. 4 Id. 437; *Closson* v. *Morrison*, 47 N. H. 482; and upon the authority of these cases the doctrine of the principal case may be considered as settled in this country, as upon principle it ought to be; for it would seem to be clearly within the reason of the rule in the *Six Carpenters' Case*, 8 Co. 146, s. c. 1 Smith's Lead. Cas. *216, that if a man abuse an authority given him by the law, he becomes a trespasser *ab initio*.

The question involved is one of great practical importance in the ordinary administration of justice, and it is somewhat surprising that the question should not have been settled at a much earlier date. In this country, however, it can no longer be considered an open question; and we doubt whether the *dicta* in the old English authorities above cited would now be followed even in England.

M. D. Ewell.

Chicago, Ill.